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Lord WBK Haulage Sdn Bhd v Jamaludin bin Ismail

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HIGH COURT (PULAU PINANG) — SUIT NO PA-16–8–08 OF 2023
AZIZAN MD ARSHAD JC
26 DECEMBER 2023

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Labour Law — Award — Appeal against order of Director General of Labour — Allegation that issues raised by employer at Labour Office not addressed by Labour Office — Whether labour office formulated own issues in grounds of judgment — Whether Labour Office addressed settlement signed between parties — Whether Labour Office erred in equating basic wages to minimum wages — Whether employees deemed laid off — Whether claim time barred — Whether employees employment contract co-extensive with employer's contract with another company — Employment Act 1955 ss 2, 33, 69 (1)(a)

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This was appeal by the appellant against the order of the Director-General of Labour through its Labour Officer in awarding the total sum of RM387,555.19 to the respondents. The respondents filed a complaint against the company under s 69 (1)(a) of the Employment Act 1955 ('Act') under three heads of claims, namely: (a) shortfall of minimum wages; (b) compensation for termination; and (c) compensation in lieu of notice of termination. An enquiry was held by the Labour Office wherein the issues raised by the appellant were that: (i) there was already a settlement signed by the respondents and duly acknowledged by the Labour Court; (ii) the claims were time-barred; (iii) there was no shortfall in minimum wages; (iv) the respondents were deemed laid off by way of reg. 5 of the Employment (Termination and Lay-off Benefits) Regulations 1980 ('Regulations'); and (v) a term of the employment contract of the respondents made the contract co-extensive with the main contract between the appellant and Shell Malaysia, ie, in the event Shell terminated the contract with the appellant, the respondents' contract were *ipso facto* terminated. After a full hearing, the Labour Office granted an order in favour of the respondent. However, in the grounds of the Labour Officer, the Labour Officer formulated only three issues, namely: (A) whether the respondents were workers within the definition of the Act; (B) whether the respondents were eligible to seek balance of minimum wages; and (C) in the event there was termination of service, whether the workers were eligible for payment in lieu of notice and termination of benefit. Hence the present appeal. The issues raised related to the grounds of the judgment ('GOJ') by the Labour Office, primarily, that several issues raised by the appellant were not decided by the Labour Office and that the Labour Office only responded to three issues in the GOJ. The issues that arose for determination, inter alia, were: (1) whether the Labour Officer addressed his mind to the settlement signed by the parties;

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(2) whether the Labour Officer erred in law and fact in equating basic wages to minimum wages; (3) whether the respondents were deemed laid off; (4) whether the respondent's claim were time barred; and (5) whether the employment contract was co-extensive with the employer's contract with Shell Malaysia Trading Sdn Bhd.

Held, allowing the appeal in part:

(1) The parties actually intended for this case to be settled without any disputes related to it in the future and the appellant himself had failed to fully comply with the settlement agreement. This action by the appellant was an action that could not be defended, and the respondent was entitled to bring this action again without hindrance or res judicata because it was not decided on merit by any party that had the authority to do so. The court agreed with the judgment of the Labour Office that this complaint could be heard and decided and was not bound to the settlement which was never complied with by the appellant (see para 25).

(2) On the question of fact and law, there was no error in the decision of the Labour Office regarding the issue that the appellant had paid a wage contrary to the minimum wages and wages paid were below the minimum wage as defined under s 2 of the Employment Act 1955. The appellant's actions could not be normalised as a practice in the industry, regardless of which industry the company was in (see paras 35–36).

(3) Complaints to the Director General for Employer related to wages must be made within 90 days, but complaints against Employer for other financial claims could not be brought under s 33 of the Employment Act 1955 but under s 69 of Employment Act 1955, itself. For complaints under section 69 of the Employment Act 1955 (for other financial claims) was not subject to a time limit as complaints under s 33(1) (c) of the Employment Act 1955 (for wages) (see para 61).

(4) The decision of The Labour Office was correct when it decided that the provision of Regulation 5 of the Employment Regulations (Termination and Temporary Employment Benefits) 1980 referred to by the appellant was not applicable, as it was proved that the appellant was still giving work instructions to the respondent. This provision only applied if no work was provided for a period of four consecutive weeks. The decision of the Director General of Labour Office was affirmed on this issue. The termination notice only applied in May 2021 and the opening in June 2014. This claim could still be made and was not hindered by the time limit (see para 71).

(5) It was inappropriate for appellant to rely on the termination of the appellant's contact with Shell as a reason for the termination of the respondents' relationship. That clause on the notice to terminate service

of the respondents had nothing to do with Shell's contract. Even though the appellant's company contract with Shell had ended, the employment contract relationship between the appellant and the respondent still existed and was in force, and no termination had been made (see paras 86–87).

(6) The period of service of the respondent together with the appellant was more than twelve months. Since the respondent had been terminated by the appellant, the respondent could rely on reg 6(1) of the Employment Regulations (Termination and Temporary Employment Benefits) 1980 for the calculation and formula of payment of the respondent's wage rate and length of service with the appellant. The additional issues which had been argued by the appellant was not in favour of the appellant and would not change the outcome of the appeal. There were serious appealable errors by Director-General of Labour Office that warranted the interference and ought to be corrected by the court (see paras 88–89 & 92).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap perintah Ketua Pengarah Buruh melalui Pegawai Buruhnya dalam memberikan award dengan jumlah keseluruhan RM387,555.19 kepada responden. Responden memfailkan aduan terhadap syarikat di bawah s 69 (1)(a) Akta Kerja 1955 ('Akta') di bawah tiga tuntutan utama, iaitu: (a) kekurangan gaji minimum; (b) pampasan untuk penamatan; dan (c) pampasan sebagai ganti kepada notis penamatan. Satu siasatan telah diadakan oleh Pejabat Buruh di mana isu yang dibangkitkan oleh perayu ialah: (i) sudah ada penyelesaian yang ditandatangani oleh responden dan diakui sewajarnya oleh Mahkamah Buruh; (ii) tuntutan telah disekat had masa; (iii) tiada kekurangan dalam gaji minimum; (iv) responden dianggap diberhentikan kerja melalui peraturan. 5 Peraturan-Peraturan Kerja (Faedah Penamatan dan Rentikerja Sentara) 1980 ('Peraturan'); dan (v) tempoh kontrak pekerjaan responden menjadikan kontrak itu meluas bersama dengan kontrak utama antara perayu dan Shell Malaysia, iaitu, sekiranya Shell menamatkan kontrak dengan perayu, kontrak responden adalah *ipso facto* ditamatkan. Selepas perbicaraan penuh, Pejabat Buruh memberikan perintah yang memihak kepada responden. Bagaimanapun, dalam alasan Pegawai Buruh, Pegawai Buruh hanya merumuskan tiga isu, iaitu: (A) sama ada responden adalah pekerja mengikut takrifan Akta; (B) sama ada responden layak untuk mendapatkan baki gaji minimum; dan (C) sekiranya berlaku penamatan perkhidmatan, sama ada pekerja layak menerima bayaran sebagai ganti notis dan penamatan faedah. Oleh itu rayuan semasa. Isu yang dibangkitkan berkaitan dengan alasan penghakiman ('AP') oleh Pejabat Buruh, terutamanya, bahawa beberapa isu yang dibangkitkan oleh perayu tidak diputuskan oleh Pejabat Buruh dan bahawa Pejabat Buruh hanya menjawab tiga isu dalam AP. Isu-isu yang timbul untuk penentuan, antara lain, adalah:

(1) sama ada Pegawai Buruh mengarahkan fikirannya kepada penyelesaian yang ditandatangani oleh pihak-pihak; (2) sama ada Pegawai Buruh terkhilaf dari segi undang-undang dan fakta dalam menyamakan gaji asas dengan gaji minimum; (3) sama ada responden dianggap diberhentikan kerja; (4) sama ada tuntutan responden disekat had masa; dan (5) sama ada kontrak pekerjaan adalah bersamaan dengan kontrak majikan dengan Shell Malaysia Trading Sdn Bhd.

Diputuskan, membenarkan rayuan sebahagiannya:

(1) Pihak-pihak sebenarnya berhasrat agar kes ini diselesaikan tanpa sebarang pertikaian yang berkaitan dengannya pada masa hadapan dan perayu sendiri telah gagal mematuhi sepenuhnya perjanjian penyelesaian itu. Tindakan perayu ini merupakan tindakan yang tidak boleh dipertahankan, dan responden berhak membawa tindakan ini semula tanpa halangan atau res judicata kerana ia tidak diputuskan secara merit oleh mana-mana pihak yang mempunyai kuasa untuk berbuat demikian. Mahkamah bersetuju dengan penghakiman Pejabat Buruh bahawa aduan ini boleh didengar dan diputuskan serta tidak terikat kepada penyelesaian yang tidak pernah dipatuhi oleh perayu (lihat perenggan 25).

(2) Mengenai persoalan fakta dan undang-undang, tidak terdapat kesilapan dalam keputusan Pejabat Buruh berhubung isu bahawa perayu telah membayar gaji yang bertentangan dengan gaji minimum dan gaji yang dibayar adalah di bawah gaji minimum seperti yang ditakrifkan di bawah s 2. Akta Kerja 1955. Tindakan perayu tidak boleh dinormalisasi sebagai amalan dalam industri, tidak kira dalam industri mana syarikat itu berada (lihat perenggan 35–36).

(3) Aduan kepada Ketua Pengarah untuk Majikan berkaitan gaji mesti dibuat dalam tempoh 90 hari, tetapi aduan terhadap Majikan untuk tuntutan kewangan lain tidak boleh dibawa di bawah s 33 Akta Kerja 1955 tetapi di bawah s 69 Akta Kerja 1955, itu sendiri. Bagi aduan di bawah seksyen 69 Akta Kerja 1955 (untuk tuntutan kewangan lain) tidak tertakluk kepada had masa kerana aduan di bawah s 33(1)(c) Akta Kerja 1955 (untuk upah) (lihat perenggan 61).

(4) Keputusan Pejabat Tenaga Kerja adalah tepat apabila memutuskan bahawa peruntukan Peraturan 5 Peraturan-Peraturan Kerja (Faedah-Faedah Penamatan dan Rentikerja Sentara) 1980 yang dirujuk oleh perayu adalah tidak terpakai, kerana terbukti bahawa perayu masih memberi arahan kerja kepada responden. Peruntukan ini hanya terpakai jika tiada kerja disediakan untuk tempoh empat minggu berturut-turut. Keputusan Ketua Pengarah Pejabat Buruh telah disahkan mengenai isu ini. Notis penamatan hanya digunakan pada Mei 2021 dan pembukaan

pada Jun 2014. Tuntutan ini masih boleh dibuat dan tidak dihalang oleh had masa (lihat perenggan 71).

(5) Ia adalah tidak wajar bagi perayu untuk bergantung pada penamatan hubungan perayu dengan Shell sebagai alasan untuk penamatan hubungan responden. Klausa pada notis untuk menamatkan perkhidmatan responden tidak ada kaitan dengan kontrak Shell. Walaupun kontrak syarikat perayu dengan Shell telah tamat, hubungan kontrak pekerjaan antara perayu dan responden masih wujud dan berkuat kuasa, dan tiada penamatan dibuat (lihat perenggan 86–87).

(6) Tempoh perkhidmatan responden bersama perayu adalah lebih daripada dua belas bulan. Memandangkan responden telah ditamatkan perkhidmatan oleh perayu, responden boleh bergantung kepada peraturan 6(1) Peraturan-Peraturan Kerja (Faedah-Faedah Penamatan dan Rentikerja Sentara) 1980 untuk pengiraan dan formula pembayaran kadar gaji responden dan tempoh perkhidmatan dengan perayu. Isu tambahan yang telah dihujahkan oleh perayu tidak memihak kepada perayu dan tidak akan mengubah keputusan rayuan. Terdapat kekhilafan serius yang boleh dirayu oleh Ketua Pengarah Pejabat Buruh yang memerlukan campur tangan dan harus diperbetulkan oleh mahkamah (lihat perenggan 88–89 & 92).]

Cases referred to

ASWJ Konsortium Sdn Bhd v Airport Limo (M) Sdn Bhd [2023] MLJU 1487, HC (distd)

Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2021] 3 MLJ 466; [2021] 2 ILR 177; [2021] 4 CLJ 775, FC (refd)

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)

Kesatuan Kebangsaan Pekerja-Pekerja Ladang (NUPW) v RSSB Risda Semaian dan Landskap Sdn Bhd (Ladang Getah Risda Kg Awah) [2011] 1 ILJ 405; [2011] 1 ILR 179, IC (refd)

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2018] 2 MLJ 590; [2017] 2 ILR 230, FC (refd)

Kumaran Suppiah v Dato' Noh bin Haji Omar & Anor [2006] 6 MLJ 393; [2006] 4 CLJ 675, FC (refd)

Lee Fatt Seng v Harper Gilfillan (1980) Sdn Bhd [1988] 1 MLJ 245; [1988] 1 CLJ Rep 156, SC (refd)

Ling Towi Sing @ Ling Chooi Sieng & Ors (acting in the capacity of the Committee for the estate of Ng Kong Yeam) v Sino America Tours Corp Pte Ltd [2022] 3 MLJ 821; [2022] 6 CLJ 836, CA (refd)

Pacific Sanctuary Holdings Sdn Bhd (formerly known as Ideal Prestige Sdn Bhd) v

Masaland Construction Sdn Bhd [2020] 3 MLJ 692; [2020] 4 CLJ 490, CA (refd)
Puncak Alam Housing Sdn Bhd (formerly known as Bukit Cerakah Development Sdn Bhd) v Menta Construction Sdn Bhd & Anor [2014] 1 MLJ 287, CA (refd)
R v Surrey (North-Eastern Area) Assessment Committee, ex p Surrey County Valuation Committee [1948] 1 KB 28 (refd)
Robert Lee @ Robert Seet & Anor v Wong Ah Yap & Anor [2007] 4 MLJ 393, FC (refd)
Sambu (M) Sdn Bhd v Stone World Sdn Bhd & Anor [1996] MLJU 510; [1996] 2 CLJ 523, HC (refd)
Seni Jaya Sdn Bhd & Anor v Dato' Hj Ahmad Tarmizi bin Hj Puteh & Anor [2019] 2 MLJ 154; [2019] 1 CLJ 713, FC (refd)
Turf Club Auto Emporium Pte Ltd and Others v Yeo Boong Hua and Others and Another Appeal and Other Matters [2017] 2 SLR 12, CA (refd)
Uvarajah Kanasevan & Anor v Penolong Pengarah Buruh, Butterworth & Ors [1992] 2 MLJ 152; [1992] 1 CLJ Rep 348, SC (refd)

Legislation referred to

Employment Act 1955 ss 2, 12(2), 18, 19, 33, 33(1), (1)(c), (2), (3), 69, 69(1), (1)(a), (2)(i), Part III
Employment Regulations 1957 Form C
Employment (Termination and Lay-Off Benefits) Regulations 1980 reg 5
Employment (Termination and Temporary Employment Benefits) Regulations 1980 regs 3(1), 6(1)
Limitation Act 1953 s 3
Minimum Wage Order 2012
Minimum Wage Order 2016
Minimum Wage Order 2020
Public Authorities Protection Act 1948 s 2

Annie Gomez (Kamarudin & Partners) for the appellant.
Siti Rafidah bt Abdul Raof (Aswandi Hashim & Co) for the respondent.

Azizan Md Arshad JC:

[1] This an appeal by the appellant (Lord WBK Haulage Sdn Bhd) against the order of the Director-General of Labour through its labour officer, dated 28 July 2023 in awarding the total sum of RM387,555.19 to the respondents (Jamaludin bin Ismail and nine others).

[2] This court on 15 December 2023 had allowed a part of the appeal. Parties are referred to as they were in High Court.

BACKGROUNDS OF THE CASE

[3] The facts of the case referred to in this judgment are based on the undisputed submissions of both parties. This case was heard simultaneously and decided by the Labour Office on 28 July 2023.

[4] The respondents ie Jamaludin bin Ismail and nine others filed a complaint against the company under s 69(1)(a) of the Employment Act 1955. The complaint is for three heads of claims:

(a) shortfall of minimum wages;

(b) compensation for termination; and

(c) compensation in lieu of notice of termination.

[5] An enquiry was held by the Labour Office on 24 November 2022, 14 December 2022 and 15 December 2022. Five witnesses appeared for the respondents ('complainants') as agreed by parties while the appellant ('company') adduced one witness.

[6] During the enquiry, the issues raised by the appellant were as follows:

(a) there was already a settlement dated 18 December 2020 signed by the respondents and duly acknowledged by the Labour Court;

(b) the respondents claims are time-barred;

(c) there is no shortfall in minimum wages;

(d) the respondents were deemed laid-off by way of reg 5 of the Employment (Termination and Lay-Off Benefits) Regulations 1980.

(e) a term of the employment contracts of the respondents makes the contract co-extensive with the main contact between the appellant and Shell Malaysia ie in the event Shell terminates the contract with the appellant, the respondents contracts are ipso facto terminated.

[7] After a full hearing, the Labour Office granted an order dated 28 July 2023 in favour of the respondent. However, in the grounds of the Labour Officer, the Labour Officer formulated four issues as stated in his grounds as follows:

(a) Whether the Complainants/respondents are workers within the definition of the Employment Act 1955?

(b) Whether the Complaints/respondents are eligible to seek balance of minimum wages?

(c) In the event, there was termination of service, whether the workers are eligible for payment in lieu of notice and termination benefit?

ISSUES BEFORE THE HIGH COURT

[8] The preliminary issue to the grounds of the judgment ('GOJ') by the Labour Office is that the arguments related to several issues raised by the appellant were not decided by the Labour Office. The Labour Office only responded to those three issues in the GOJ.

[9] This court reviewed the GOJ of the Labour Office and found that some issues were not commented or decided in the GOJ which was submitted during of the enquiry.

[10] This court takes the approach that this is an appeal, the High Court has the right to examine this entire case as argued before the court as if it was the first time raised by the parties

There was already a settlement dated 18 December 2020 signed by the respondents and duly acknowledged by the Labour Court

The appellant's submissions

[11] The appellant submits that that the Labour Officer erred in law and fact in not addressing his mind to the facts supporting the contentions of the appellants on this issue.

[12] A similar complaint on the same claims by Jamaludin bin Ismail and nine of the same complainants herein was settled by all the respondents in kes saman Ketua Pengarah Buruh No KBR/10702/2020/0408 which the first respondent Jamaludin bin Ismail on behalf of all the respondents signed the settlement letter dated 18 December 2020 which states as follows:

> Saya Jamaludin bin Ismail No IC 710903–07–5019 mewakili 9 orang yang lain dengan ini menarik balik kes yang difailkan pada 21 October 2020 tanpa paksaan mana-mana pihak. *Jadi saya anggap kes ini telah selesai*.

[13] The settlement was duly acknowledged by the Director-General's office (Labour Office) at Butterworth (Kepala Batas). This settlement letter was duly admitted by the first witness, Jamaludin bin Ismail as signed and sent to the Labour Court at the enquiry.

[14] It is submitted that the settlement as clearly evinced by the first respondent's letter dated 18 December 2020 and duly acknowledged by the

Labour Office is full and final and that the settlement puts an end to the proceedings. The respondents were precluded from pursuing the instant claim.

[15] The first respondent, Jamaludin bin Ismail, in cross-examination stated that the company did not pay on the settlement and that is why the instant claim was re-filed. At the enquiry, the first respondent was cross-examined as follows:

> Q: Setuju keterangan pada hari ini tiada penyelesaian manakala surat yang diterima oleh Pejabat Tenaga Kerja kamu kata kes ini telah selesai?
>
> J: Ya, berdasarkan surat ini.

[16] The law on settlement is clear. In the event there is a breach of settlement the aggrieved party has to commence an action for breach of settlement and not by re-filing the claim. The appellant refers to the case of *Pacific Sanctuary Holdings Sdn Bhd (formerly known as Ideal Prestige Sdn Bhd) v Masaland Construction Sdn Bhd* [2020] 3 MLJ 692 at p 700; [2020] 4 CLJ 490, at p 497 para 21, the Court of Appeal held:

> The settlement agreement constitutes a new and independent agreement for good consideration. Its effect in law is to supersede the original cause of action altogether and put an end to the proceedings, which are thereby spent and exhausted. The parties are therefore precluded from taking any further steers in file action.
>
> ...
>
> With due respect to the learned JC, we are of the view that His Lordship erred in law in holding that this case is distinguishable on its own facts. In arriving at the above decision, the Singapore Court of Appeal applied the principles stated by the English Court of Queen's Bench Division in *Green v Rozen* [1995] 1 WLR 741. The facts were as follows:
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> > The defendants having failed to pay the last instalment and the costs, the plaintiff made an application in the original action asking for judgment for the amount of the final instalment and an order for the costs. Slade J held that the application must be refused because, the court have made no order in the action, the agreement compromising the action between the parties completely superseded the original cause of action and the court had no further jurisdiction in respect of that cause of action. His Lordship went on the say that if the terms of the new agreement were not complied with, then the injured party must seek his remedy on the new agreement. In other words, the plaintiff's only remedy was to bring an action on the agreement of compromise.

[17] In *Sambu (M) Sdn Bhd v Stone World Sdn Bhd & Anor* [1996] MLJU 510; [1996] 2 CLJ 523, Abdul Malik Ishak J (later as JCA) held that:

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> ... where the parties had settled or compromised pending proceedings, the settlement would put an end to file proceedings preclude the parties from taking further steps in file action and supersede the original cause of action.

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(See *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal and other matters* [2017] 2 SLR 12.)

[18] The appellant submits that on this ground alone, ie a settlement was affected and acknowledged by the respondents. The instant claim by the respondents ought to be dismissed by the Labour Court at first instance.

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The respondent's submissions

[19] The respondent argued that there is no obstacle for this case to be complained to the Labour Office due to appellant's own failure to comply with the agreement entered into by the parties. In this case also there is no agreement entered into which is expressly agreed that this action can no longer be brought back.

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[20] Since the appellant has failed to comply, it is the respondent's right to bring this claim back to the court. In the same hope there is no court order preventing this action from being filed.

Findings of the court

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[21] As the application of basic principles, an agreement entered into by both parties are binding and it is in line with public policy that every final agreement should be given emphasis and legal effect. This principle was clearly stated in the case of *Puncak Alam Housing Sdn Bhd (formerly known as Bukit Cerakah Development Sdn Bhd) v Menta Construction Sdn Bhd & Anor* [2014] 1 MLJ 287, it was decided that:

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> [23] There was a compromise between the appellant and the first respondent by way of a settlement agreement and that ended the suit between the parties. Public policy demands that there should be an end to litigation and the parties should be held to their bargains. Lord Romilly MR in *Plumley v Horrell* (1869) 20 LT 473, aptly said:
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> > The Master of the Rolls said that when an agreement was entered into for a compromise, one would suppose, prima facie, that the case was not to be tried over again.

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[22] Whether the settlement agreement is final and unconditional, this court refers to the case of *Seni Jaya Sdn Bhd & Anor v Dato' Hj Ahmad Tarmizi bin Hj Puteh & Anor* [2019] 2 MLJ 154; [2019] 1 CLJ 713, held that:

[21] What s 7(a) says is simply this. For any concluded agreement to come into existence there must be a clear and definite offer by the proposer and an 'absolute and unqualified' acceptance of the same by the offeree. The phrase 'absolute and unqualified' is critical in that any acceptance coupled with any condition can never be a 'absolute and unqualified' acceptance. It must be absolute in that all terms set out in the offer must be accepted. It must be unqualified in that acceptance attached with condition is a qualified acceptance. Once such conditional acceptance is on the negotiating table so to speak, the parties are simply back to the negotiating mode as there is now a counter offer by the offeree which in effect rejects the proposal. Withdrawal of the conditional acceptance per se would not revive the original offer. Only an absolute and unqualified acceptance of the counter offer by the proposer will there be a concluded contract between the proposer and offeree.

[22] As to what should be the approach to employ in unraveling the factual matrix to determine whether parties had reached consensus ad idem on the terms, the Federal Court in *Deutsche Bank (M) Bhd v MBF Holdings Bhd & Anor* [2015] 6 MLJ 310; [2015] 8 CLJ 1068, reasoned that that question 'could only be gleaned from the mandate letter, the emails/letters and conduct of the parties' and 'not on the subjective mind, but upon a consideration of what was communicated between them by words or conduct ... from the perspective of the notional reasonable man'. In other words, the test is an objective one.

[23] This court differentiates this case from the case of *ASWJ Konsortium Sdn Bhd v Airport Limo (M) Sdn Bhd* [2023] MLJU 1487 which was decided by this court which also involves the settlement of the case through mutual agreement. In that case, the plaintiff himself has confessed and the defendant has proven that the settlement of the case has been fully complied with. Allowing a similar action where the plaintiff does not receive compensation will create unjust enrichment. Those facts are distinguished from the present case.

[24] This court agrees with the respondent's argument that the letter signed by the respondent did not mention at all that the respondent withdrew the case without the liberty to re-file. There is also no order issued by the Labour Office regarding the withdrawal of that case.

[25] In this case, based on the facts, the parties actually intend for this case to be settled without any disputes related to it in the future and the appellant himself has failed to fully comply with the settlement agreement. This action by the appellant is an action that cannot be defended and the respondent is entitled to bring this action again without hindrance or res judicata because it was not decided on merit by any party that has the authority to do so. The court agreed with the judgment of the Labour Office that this complaint can be heard and decided and is not bound to the settlement which was never complied with by the appellant.

Wrong interpretation of minimum wage

The appellant's submissions

[26] The appellant submits that the Labour Officer erred in law and fact in equating basic wages to minimum wages. Basic wages are not minimum wages. The Employment Act 1955 clear defines wages in s 2 of the Act as follows:

> 'wages' means basic wages and all other payments in cash payable to an employee for work done in respect of his contract of service but does not include:
>
> (a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;
>
> (b) any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme or any other fund or scheme established for the benefit or welfare of the employee;
>
> (c) any travelling allowance or the value of any travelling concession;
>
> (d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;
>
> (e) any gratuity payable on discharge or retirement; or
>
> (f) any annual bonus or any part of any annual bonus.

[27] Nine of the respondents are lorry drivers transporting petrol to gas stations. In addition to their basic pay, the respondents are paid wages on an hourly basis, and for incentives and standby allowance in the course of their duties. The salary breakdown can be gleaned from one of the employment agreements of the nine respondents ie Mohd Sami bin Sudin:

> GAJI ASAS DAN ELAUN
>
> 1. Gaji Asas RM450.00 sebulan
>
> 2. Komisyen dan insentif Saudara akan dikira mengikut hari anda memandu Ion adalah sepedi berikut:
>
> (a) Compensation/Commission Perjalanan Additional for local trip <40KM STK
>
> (b) insentif KPI (Tanpa Violation)
>
> (c) Alaun Handphone
>
> (d) Alaun Shift
>
> (e) Alaun standby on site
>
> RM0.26/satu KM. RM6.00 satu trip

RM150.00 setiap bulan memandu RM53.00 setiap bulan memandu RM35.00 setiap hari

RM35.00 setiap hari2. Sebagai pemandu lori kontrak caruman KWSP dan SOCSO saudara akan dikira berdasarkan) jumlah gaji sebulan sahaja.

[28] It is clear from the employment contract which is similar for all the nine respondents in respect of their wages that the salary has two aspects — the basic salary on one part and on the other part — daily trip rate, commission and incentive payment for work done in course of their employment ie to drive the tankers. The total makes up the monthly wages. These wages exceed the minimum wage as set out by the minimum wage order from time to time.

[29] In *Lee Fatt Seng v Harper Gilfillan (1980) Sdn Bhd* [1988] 1 MLJ 245; [1988] 1 CLJ Rep 156, wherein the Federal Court held that wages mean all work are in respect of the contract of service. The Federal Court stated:

It seems that the words 'work done' in the definition of 'wages' are used so as to stress on the requirement that the remuneration must be for work done in respect of the contract of service of the employee concerned, so that any payment made to him by the employer ex gratia, not for work done or to be done, and not in connection with the contract of service, is not part of the wages.

[30] The respondents contract clearly states ex gratia payment separately and not part of wages. The appellant argued that basic wages are not minimum wages. The respondent argued that in this case the wages paid are below the minimum wage as defined in s 2 of the Act and the findings by the Labour Office for the minimum wage are accurate and should be maintained. In the case *Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia* [2021] 3 MLJ 466; [2021] 2 ILR 177; [2021] 4 CLJ 775, the Federal Court held that:

(5) What follows from a consideration of the definition of 'basic wages' under s 2 of the Employment Act and the use of the term 'basic wages' and 'minimum wages' in s 24 of the MWO 2012, is that the term 'basic wages' as utilised under the minimum wages definition, refers to a sum of money which may well differ in terms of quantum, from the 'basic wages' under a contract of service under s 2 of the Employment Act in s 24 of the NWCCA 2011. The difference is simply that 'basic wages' under the minimum wages definition refers to a sum of money which Parliament determines under s 23 of the NWCCA to be the bare minimum sum payable for work done under a contract of service for all employees in the nation, regardless of what their individual contracts of service or collective agreement provide. It cuts across all contractual arrangements to provide a basic minimum wage, legislatively. Whereas 'basic wages' under the Employment Act refers to the contractual sum negotiated between the employer and employee under a contract of service or a collective agreement. Therefore, the effect of the minimum wage

legislation is to increase the quantum of basic wages under individual contracts of employment or a collective agreement where the sums paid as 'basic wages' fall below the statutory minimum prescribed by law. That is the difference which the NWCCA and the MWO sought to address. Where the quantum of 'basic wages' under a contract of service or collective agreement is less than the 'minimum wage' as stipulated under the MWO, s 24 requires the employer to increase the 'basic wage' to meet the 'minimum wage' stipulated under the MWO 2012 (paras 68–71):

> 24 Effect of the minimum wages order
>
> (1) For the purpose of this section, 'contract of service' includes the collective agreement made under s 14 of the Industrial Relations Act 1967 (Act 177).
>
> (2) Where the rates of the basic wages agreed in a contract of service is lower than the minimum wages rates as specified in the minimum wages order, the rates shall be substituted with any rates not lower than the minimum wages rates as specified in the minimum wages order.

[69] *The difference which we have sought to explain above is simply that 'basic wages' under the minimum wages definition refers to a sum of money which Parliament determines under s 23 to be the bare minimum sum payable for work done under a contract of service for all employees in the nation, regardless of what their individual contracts of service or collective agreement provide. In short, it cuts across all contractual arrangements to provide a basic minimum wage, legislatively*.

[70] *Whereas 'basic wages' under the Employment Act 1955 refers to the contractual sum negotiated between the employer and employee under a contract of service or a collective agreement*.

[71] Therefore, the effect of the minimum wage legislation is to increase the quantum of basic wages under individual contracts of employment or a collective agreement where the sums paid as 'basic wages' fall below the statutory minimum prescribed by law. That is the difference which the NWCCA 2011 and MWO 2012 seek to address. Put another way, where the quantum of 'basic wages' under a contract of service or collective agreement is less than the 'minimum wage' as stipulated under the MWO 2012, s 24 requires the employer to increase the 'basic wage' to meet the 'minimum wage' stipulated under the MWO 2012.

[31] The respondent argued that the minimum wage order is applicable between the respondent and the appellant's company. The respondent refers to the salary slip of one of the respondents in exh P5, which clearly shows that the basic salary received is below the minimum wage level/does not comply with the minimum wage *gazetted* by the government. The respondent argued that there was no error in the judgment by the Labour Office and it should be upheld by this court.

[32] The respondent also argued that the Labour Court had correctly ordered that the respondent deserved to be paid the balance of the minimum wage demanded on the grounds that the appellant had failed to comply with

the minimum wage orders and there was no evidence that the appellant applied for restructuring/exemption for:

(a) Minimum Wage Order 2012 — minimum wage RM900;

(b) Minimum Wage Order 2016 — minimum wage RM1,000;

(c) Minimum Wage Order (Amendment) 2018 — minimum wage RM1,100; and

(d) Minimum Wage Order 2020 — minimum wage of RM1,200

[33] The respondents strongly argued that the Form C order dated 28 July 2023 was correct where the court on the balance of probabilities allowed the respondent's claim for the remaining minimum salary from September 2015 to September 2020 and that the respondent was entitled to the claim. No reasonable reason was shown by the appellant why the respondent was not paid according to the minimum wage *gazetted* by the Malaysian Government.

Findings of the court

[34] The court found that although the case referred to by the appellant was also a case decided by the Federal Court, this court adopted the latest case as strict as the principle in the case of *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645 which decided as follows:

> If the House of Lords, and by analogy, the Federal Court, departs from its previous decision when it is right to do so in the circumstances set out above, then also by necessary implication, its decision represents the present state of the law. *When two decisions of the Federal Court conflict, on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision.* (Emphasis added.)

[35] This court found on the question of fact and law that there was no error that was decided by the Labour Office regarding the issue that the appellant had paid a wage contrary to the minimum wages and wages paid are below the minimum wage as defined under s 2 of the Employment Act 1955.

[36] This court is of the opinion that the appellant's actions cannot be normalised as a practice in the industry, regardless of which industry the company is in. The obiter stated in the *Crystal* case is precisely as follows:

> (1) The ripple effect of the minimum wage has been acknowledged as a benefit or a consequence of minimum wages by the International Labour Organisation ('ILO'). In like vein, the ripple effect would have an effect on all employers in all industries. *The hotel industry perhaps feels the difference more keenly because it has, until now, been relatively insulated by relying on its customers or third parties to meet its basic costs and overheads in relation to its employees. Without this sizeable subsidy or supplement, which other industries have had to cope with, the effect of the implementation of the minimum*

wage has been particularly grim and challenging. However, that in itself cannot justify a distorted or biased construction of the definition of 'basic wages' and 'minimum wage' as specified, or of the purpose and object of the minimum wage legislation. The ripple effect does not afford any rational basis for the implementation of the 'Clean Wage Structure' or the 'Top-Up Structure' (paras 105–106). (Emphasis added)

The respondents claims are time-barred

The appellant's submissions

[37] The Labour Officer erred in his interpretation of the law as regards the time period for an employee to lodge a complaint with the Director General of Labour in a dispute in respect of wages under an employment contract.

[38] The enabling provision for a complaint to be lodge is s 69 of the Employment Act ('the Act') more specifically sub-ss (1)(a) and (2)(i) which reads:

69 Director General's power to inquire into complaints

(1) The Director General may inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee under —

(a) any term of the contract of service between such employee and his employer;

(b) any of the provisions of this Act or any subsidiary legislation made thereunder; or

(c) any of the provisions of this Act or any subsidiary legislation made thereunder, or

the provisions of the Wages Council Act 1947 or any order made thereunder, and, in pursuance of such decision, may make an order in the prescribed form for the payment by the employer of such sum of money as he deems just without limitation of the amount thereof.

(2) The powers of the Director General under subsection (1) shall include the power to hear and decide, in accordance with the procedure laid down in this Act, any claim by —

(i) an employee against any person liable under section 33; contractor for labour against a principal, contractor or subcontractor for any sum which the contractor for labour c/a/ms to be due to him in respect of any labour provided by him under his contract with the contractor or sub-contractor; or

(ii) an employer against his employee in respect of indemnity due to such employer under subsection 13(1),

and to make such consequential orders as may be necessary to give effect to his decision.

[39] The appellant submits that s (2)(i) grants an employee the right to claim any dispute on *wages against any person liable under s 33 of the Act*. There is a time limit to lodge a complaint on wages. Section 33 of the Act specifically stipulates the period of limitation to lodge a complaint on wages against the employer. Section 33 states:

> 33 Liability of principals and contractors for wages
>
> (1) Where a principal in the course of or for the purposes of his trade or business, contracts with a contractor for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, and any wages are due to any employee by the contractor or any subcontractor under the contractor for work done in the course of the performance of the contract, the principal and the contractor and any such sub-contractor (not being the employer) shall be jointly and severally liable with the employer to pay such wages as if that employee had been immediately employed by the principal and by the contractor and any such sub-contractor.
>
> Provided that —
>
> (a) in the case of a contract for constructional work the principal shall not be liable for the payment of wages under this subsection unless he is also a constructional contractor or a housing developer;
>
> (b) the principal, and the contractor and any sub-contractor (not being the employer), shall not be liable to any employee under this subsection for more than the wages due to him for any three consecutive months; and
>
> (c) the employee shall have instituted proceedings against the principal for the recovery of his wages or made a complaint fo the Director General under Part XV within ninety days from the date on which such wages became due for payment by his employer in accordance with the provisions for the payment of wages contained in Part III.
>
> (2) Any person, other than the employer, who has paid wages under this section to the employee of any employer may institute civil proceedings against such employer for the recovery of the amount of wages so paid.

[40] The operational of s 33(1)(c) of the Employment Act 1955 which stipulates the employee shall have instituted his claim to the Director within 90 days for such wages due by his employer. It should be noted here that s 33(1)(c) of the Employment Act 1955 specifically mentions principal and employer as distinct legal entities. In interpreting a statute, the headings cannot come to the assistance when the words of the section are clear. In the locus classicus case of *R v Surrey (North-Eastern Area) Assessment Committee, ex p Surrey County Valuation Committee* [1948] 1 KB 28, the court held as follows:

> But while the court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is quite clear that you cannot use such headings to give a different effect to clear words of the sections where there cannot be any doubt as to their ordinary meaning.

[41] It is submitted that remedy for dispute on wages of an employee must be addressed immediately and Parliament has in the interest of the employee for an earlier resolution fixed a 90-day limitation period for instituting claims on wages.

[42] As the limitation on wages disputes are prescribed in s 33 of the Employment Act 1955, the Limitation Act cannot come to the respondent's assistance as expressly stated in s 3 of the Limitation Act. In *Ling Towi Sing @ Ling Chooi Sieng & Ors (acting in the capacity of the Committee for the estate of Ng Kong Yeam) v Sino America Tours Corp Pte Ltd* [2022] 3 MLJ 821; [2022] 6 CLJ 836 the Court of Appeal stated that the Limitation Act does not apply if another statue provides for a different period of limitation. The court held as follows (at p 845 (MLJ); p 856 (CLJ)):

> Section 24 therefore treats like cases alike and unlike cases differently. For that matter one may look at the provision of s 3 of the Limitation Act 1953 provides as follows:
>
> > 3 This Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other written law or to any action or arbitration to which the Government or the Government of any State is a party and for which if it were between subjects a period of limitation would have been prescribed by any other written law.

[43] Thus the Limitation Act 1953 does not applicable if the actions is governed by another statute that provides for a different period of limitation. An example familiar to all is that of suits brought against a public authority which is governed by s 2 of the Public Authorities Protection Act 1948 ('the PAPA') where an action in negligence for instance, must be brought within 36 months next after the act, neglect or default complained of.

The respondent's submissions

[44] The respondent argued that s 33 of the Employment Act 1955 is clearly applicable to contractors and sub-contractors only and not to employers. The interpretation that it does not apply to employers is clear if referred to s 33(1) of the Employment Act 1955.

[45] Based on the interpretation, it is clear that s 33(3) of the Employment Act 1955 is not applicable because the appellant in this case is the employer and not a principal, contractor or sub-contractor. The respondent counter-argued that there is an employer-employee relationship in this action, rather than a contractor, principal and agent relationship. This is because the appellant has already issued a service contract, paid salaries, included EPF and SOCSO contributions and paid allowances to the respondent.

[46] Therefore, the provisions of s 33 of the Employment Act 1955 do not apply against the decision by the Director General. Therefore, the respondent's action by referring to this matter under s 69 of the Act is not hindered by the time limit because it is still within the period of the Limitation Act 1953.

Findings of the court

[47] On this issue the court made the preliminary observation that:

Firstly, the court would like to emphasise that the argument whether the Labour Office is wrong or not in the judgment cannot be determined by the court because no specific findings related to this issue and did not explain the relevance of s 33(1)(c) of the Employment Act 1955 referred to by the appellant in its argument. Therefore, the court takes the approach that the parties argue again for this issue for the court's determination; and

Secondly, the arguments of the parties do not refer to any authority because the court was informed that there is no specific judgment related to this issue that has been reported so far and the court is also unable to find any reports related to this issue, specifically, as a guide.

[48] This court in referring to s 33(1) of the Employment Act 1955, found that there are words as follows:

> ... the principal and the contractor and any such sub-contractor (not being the employer) shall be jointly and severally liable with the employer to pay such wages ...

[49] It is clear that under that section, there are groups of persons who can be subject to action for wage claims, namely principals, contactors, sub-contractors (who are not employers) but if we read further, it is clear that s 33(1) of the Employment Act 1955 also applies to employers for claims against wages, for work done for the principal, contractors and sub-contractors if they fail to pay.

[50] By looking at that section, it does not only apply to principal and contractor. It is clearer that under s 33(1)(c) of the Employment Act 1955, any wages claim against the principal and employer must be brought to the Director General within 90 days. Reference to the s 33(1)(c) is as follows:

> (c) the employee shall have instituted proceedings against the principal for the recovery of his wages or made a complaint fo the Director General under Part XV *within ninety days from the date on which such wages became due for payment by his employer in accordance with the provisions for the payment of wages contained in Part III*.

[51] In s 33(c) of the Employment Act 1955

(i) in *the first part*, it is stated that if the employee wants to *instituted proceedings* against the principal for the recovery of wages; and (ii) in the second part or *made a complaint* to the Director General under Part XV,

but both must be made within *ninety days from the date on which such wages became due for payment by his employer*.

[52] It is clear that there is different cause of actions against the principal and the employer as they are separate legal entity under this provision.

[53] In the said section, it is clearly stated that the wage claim against the employee is as detailed under Part III. When referring to Part III, it is clear, that it says:

PART III PAYMENT OF WAGES

18 Wage period

18A Calculation of wages for incomplete month's work

19 Time of payment of wages

20 Payment on normal termination of contract

21 Payment on termination of contract in special circumstances and on breach of contract

22 Limitation on advances to employees

23 Wages not due for absence from work through imprisonment or attendance in court

[54] In relation to the period to pay the wage, it is clearly stated in ss 18 and 19 of the Employment Act 1955. This court is of the view that the time period or limit for wages is subject to 90 days, but not for claims other than wages.

[55] In the case of *Kesatuan Kebangsaan Pekerja-Pekerja Ladang (NUPW) v RSSB Risda Semaian dan Landskap Sdn Bhd (Ladang Getah Risda Kg Awah)* [2011] 1 ILJ 405; [2011] 1 ILR 179 it was held that:

... this limit is important to protect the welfare of workers because it involves wages for their livelihood. Sections 18 and 19 of the Employment Act 1955 ensured that the employee's wage period did not exceed one month and that the employee be paid no later than seven days after the last day of any wage period. In light of the provisions in the Employment Act 1955, the wage period for the daily rated employees would not exceed a month. The government had recognised that the productivity-linked wage system or PLWS had been the way forward to be competitive globally. The system would avoid rewarding non-performers and enable the employers to have highly motivated and productive employees.

[56] The court must give meaning based on the intention and also the wording in each piece of legislation as intended without adding other

meanings. This court would like to refer to the local case despite the learned counsel for the appellant has referred to the cases decided by a foreign court. In *Kumaran Suppiah v Dato' Noh bin Haji Omar & Anor* [2006] 6 MLJ 393; [2006] 4 CLJ 675, our Federal Court held that:

> It is a rule of construction that where the terms of an enactment are clear, precise and unambiguous it must be applied and enforced according to its plain meaning and it is not the function of the court to speculate as to what might have been in the mind of the enacting authority as it may appear to the court from the preamble or otherwise (see *Badri Prasad v Ram Narain Singh* AIR [1939] All 157).

[57] In *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2018] 2 MLJ 590; [2017] 2 ILR 230, this court said:

> [15] The function of a court when construing an Act of Parliament is primarily to interpret the statute in order to ascertain what the legislative intent is. And this is primarily done by reference to the words used in the provision. *Craiese on Legislation* (9th Ed, 2008) at p 611 states:
>
> > The cardinal rule for the construction of legislation is that it should be construed according to the intention expressed in the language used. So the function of the court is to interpret legislation 'according to the intent of them that made it' and that intent is to be deduced from the language used.

[58] If we look at s 33(2) of the Employment Act 1955, it is even clearer where the claim must be made to the employer within 90 days. This is because under s 33(2) of the Employment Act 1955, states that anyone, other than the employer who makes the wage payment under s 33 of the Employment Act 1955, can claim back the amount through civil action. This proves that wage-related complaints against the employer must be made within 90 days and any action to obtain wage payment by a third party against the employer must be through civil action. This means that under s 33(2) of the Employment Act 1955, any claims by the third party against the employer is subject to the Limitation Act 1953, as it is for debt claims or ordinary civil actions which are specifically subject to the Limitation Act 1953.

[59] When this court decides that the '90-day wage limit' is applicable, then part of the claim for the wages is rejected and should not be given to the respondents. The amount will be stated at the end of this judgment. It is clear that the demand for the minimum wage from September 2015 to September 2020 is beyond the set time limit and has exceeded 90 days when it was referred to the Director General of Labour Office on 2 November 2021. For other claims ie, the claim to substitute the notice of termination of the contract and the benefits are within the time period because they are not subject to the 90-day time limit under s 33(1)(c) of the Employment Act 1955.

[60] By referring to s 69 of the Employment Act 1955, it clearly states that actions against the employer can be made in connection wages or any other payments in cash due to such employee, but for claims in connection with wages, it is subjected to the definition under s 2 of the Employment Act 1955. What attracted the court's attention was that s 69 which itself states that any claim by the employee *against person liable under s 33* of the Employment Act 1955 will also be referred to the Director General under s 69(2)(i) of the Employment Act 1955.

[61] It is clear that complaints to the Director General for employer related to wages must be made within 90 days, *but complaints against Employer for other financial claims cannot be brought under s 33 of the Employment Act 1955 but under s 69 of Employment Act 1955*, itself. For complaints under s 69 of the Employment Act 1955 (for other financial claims) is not subject to a time limit as complaints under s 33(1)(c) of the Employment Act 1955 (for wages).

The respondents were deemed laid-off

The appellant's submissions

[62] The respondents have been laid off pursuant to reg 5 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 (Revised 1983) PU(A) 358/1983. All four respondents on behalf of all nine driver/respondents who were drivers gave evidence at the enquiry that they were not given haulage work ie their core work in driving the tanker trucks, since June 2014 when the company's contract with Shell Malaysia was terminated in May 2014. They were informed by the company in June 2014 that the company's contract with Shell Malaysia was terminated the preceding month, May 2014.

[63] They were of full knowledge of this. They were asked to seek employment elsewhere. The company continued to pay their regular emoluments pending their securing a job elsewhere. These emoluments were paid as a gesture of goodwill. Regulation 5 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 states:

> 5 Day-off
>
> (1) Where an employee is employed under a contract on such terms and conditions that his remuneration thereunder depends on his being provided by the employer with work of the kind he is employed to do, he shall, for the Purpose of regulation 3(b), be deemed to be laid —
>
> (a) the employers do not provide such work for him on at least total of twelves normal working days within ant period of four consecutive weeks; and

(b) the employee is not entitled to any remuneration under the contract for the period or periods (within such period of four consecutive weeks) in which he is not provided with work.

Provided that any period during which an employee is not provided with work as a result of a rest day, a public holiday, sick leave, maternity leave, annual leave, any other leave authorized under any written law, or any leave applied for by the employee and granted by the employer shall not be taken into account in determining whether an employee has been laid off.

(2) The continuity of a contract of service of an employee shall not be treated as broken by any lay-off as a result of which no lay-off benefits payment has been made.

[64] Based on reg 5, the respondents are deemed to be laid-off at the end of June 2014. However, the respondents were still paid until May 2021. None of the four drivers/respondents challenged this fact that they were paid until May 2021. It must note that the pandemic was declared in Malaysia in March 2020.

[65] The appellant stated very clearly in its said letter that whatever payments made to the respondents were advances made to them until they were able to secure employment elsewhere. Having been laid-off, the advances received by the respondents including the EPF and SOCSO ought to be refunded to the appellant. The driver/respondents are entitled to lay-off benefits not later than seven days after the relevant date ie 30 June 2014.

[66] In the circumstances, the respondents are only entitled to one month's wages as they are deemed to have been laid-off at the end of June 2014. The respondents were in fact, grossly overpaid for seven years and should return the advances made to the claimants for these payments. On the ground of deemed laid-off, the respondents' claim should be dismissed.

The respondent's submissions

[67] The respondent counter-argued that the respondent was not temporarily suspended as claimed by the appellant. The appellant still gave work instructions to the respondent starting in June 2014 until the last month of the respondent's service.

[68] The provision of reg 5 of the Employment Regulations (Termination and Temporary Employment Benefits) 1980 referred to by the appellant is not applicable at all because the appellant is still giving work instructions to the respondent and this provision only applies if no work is provided for a period of four consecutive weeks.

[69] Respondent counter-argued that there is no term in the respondent's service contract as a driver that their services are subject to a contract/agreement with Shell, there is no term in the respondent's service contract that their service is ongoing/applicable as long as the contract with Shell is in effect. In the absence of such a clause, the respondent argued that the respondent's services were not entirely dependent on the appellant company's contract with shell, and that the respondent was a permanent truck driver with the appellant.

Findings of the court

[70] Based on the documentary and oral evidence during the trial, this court is satisfied that the respondents have successfully proved their case on a balance of probabilities that there are instructions and work still given to them.

[71] The decision of the Labour Office was correct when it decided that the provision of reg 5 of the Employment Regulations (Termination and Temporary Employment Benefits) 1980 referred to by the appellant is not applicable, as it was proven that the appellant was still giving work instructions to the respondent. This court agrees with the learned counsel for the respondents that this provision only applies if no work is provided for a period of four consecutive weeks. This court affirmed the decision delivered by the Director General of Labour Office on this issue. The termination notice only applies in May 2021 and the opening in June 2014. This claim can still be made and is not hindered by the time limit.

The employment contract is co-extensive with the employment contract with Shell Malaysia Trading Sdn Bhd

The appellant's submissions

[72] All the drivers/respondents' (nine of them) have a common clause in their contracts ie clause.

> 7. NOTIS BERHENTI KERJA
>
> Pemandu Lori (Baru)
>
> Semasa tempoh latihan, mana-mana pihak boleh menamatkan kontrak pekerjaan dengan memberi satu (1) minggu notis. Pemandu Lori (Tetapl Selepas anda disahkan kelayakan memandu di LORD WBK, anda atau pihak majikan boleh menamatkan kontrak kerja ini dengan memberi notis secara bertulis selama satu (1) bulan sebelum tarikh behenti kerja atau membayar gaji (1) bulan bagi kekurangan tempoh notis).
>
> Namun begitu oleh kerana semua pemandu tertakluk kepada kontrak dengan Shell Trading Sdn Bhd, anda boleh dibuang kerja serta merta sekiranya didapati

melanggar mana-man a peraturan yang telah ditetapkan oleh Shell melalui Skim Kelab Pemandu Professional ataupun melanggar prosedur disiplin syarikat.

[73] This means that the employment contract is co-extensive with the employer's contract with Shell Malaysia Trading Sdn Bhd. Therefore, in the event Shell terminates the contract with the employer, the respondents' contracts with the employer ipso facto terminated. It is not merely limited to procedural non-compliance in the Shell contract.

[74] However, the employer continued to pay the respondents on the understanding which was made clear to the claimants, and which is not denied by the respondents, that the goodwill payments are made until they secure employment elsewhere. However, the respondents took advantage of this generosity by refusing to secure any employment as they were being paid for doing nothing.

[75] The respondents do not deny they were doing no work except to drive the trucks for JPJ inspections for which cash payments of between RM10-RM20 were paid for such trips. The trips are not their core job which is transporting petroleum.

[76] It is utterly disgraceful of the respondents who being paid for doing nothing are now claiming compensation for doing nothing. The nine respondents were legally deemed to be laid off and there can be no claim against the appellant.

The respondent's submissions

[77] The respondents have received a termination letter through 'Re-Confirmation of Cessation of Employment' dated 9 August 2021 issued by the appellant's solicitor. The appellant's reference to the notice of termination of employment, it is counter-argued that this is a clause on the notice to terminate service, and has nothing to do with Shell's contract. Even though the appellant's company contract with Shell has ended, the employment contract relationship between the appellant and the respondent still exists and is in force, and no termination has been made.

[78] The respondent refers to s 12(2) of the Employment Act 1955 which has stated the notice period that must be observed for termination of service as follows:

(a) four weeks' notice if he has served less than two years;

(b) six weeks' notice if he has served more than two years and not exceeding five years; and

(c) eight weeks' notice if having served more than five years.

[79] As such, the respondent argued that the respondent is eligible to claim wages in lieu of notice from the appellant's company considering that the appellant's company had already given insufficient notice as required under the Employment Act 1955.

[80] All respondents have already served with the appellant company for more than five years. Therefore, the respondent is eligible to claim wages in lieu of notice for eight weeks starting from the date the respondent received the termination letter through 'Re-Confirmation of Cessation of Employment' dated 9 August 2021.

[81] It is also argued that the calculations made by Director-General of Labour Office for the notice compensation of the nine respondents are true and correct. Regarding the claim for termination benefits, the respondent argued that the respondent is entitled to receive termination benefits from the appellant's company with reference to s 69(1) of the Employment Act 1955.

[82] The respondent refers to s 3(1) of the Employment Regulations (Termination Benefits and Temporary Employment) 1980 which has stated that an employer is required to pay termination benefits or temporary employment benefits to an employee who has been employed continuously for a period of not less than twelve months if:

(a) the employee's employment contract is terminated; or

(b) the employee is temporarily employed.

[83] The respondent argued that the period of service of the complainant — respondent together with the appellant was more than 12 months. Therefore, the Employment (Termination and Temporary Employment Benefits) Regulations 1980 are applicable to the respondent.

[84] It is also argued that because the respondent was terminated by the appellant, reg 6(1) of the Employment (Termination and Temporary Employment Benefits) Regulations 1980 is applicable to the respondent for the formula to be paid according to the respondent's wage rate and length of service with the appellant.

[85] It is also argued that the calculations made by Director-General of Labour Office for termination benefits for the nine respondents are true and correct. The respondent further argued that until now no payment has been made by the appellant based on the Form C order and no 'stay' application has been given to the appellant.

Findings of the court

[86] This court agreed with the learned counsel for the respondents that it was inappropriate for appellant to rely on the termination of the appellant's contact with Shell as a reason for the termination of the respondents' relationship. That clause on the notice to terminate service of the respondents has nothing to do with Shell's contract.

[87] Even though the appellant's company contract with Shell has ended, the employment contract relationship between the appellant and the respondent still exists and is in force, and no termination has been made.

[88] This court agrees that the respondents can rely on reg 3(1) of the Employment (Termination and Temporary Employment Benefits) Regulations 1980 which has stated that an employer is required to pay termination benefits or temporary employment benefits to an employee who has been employed continuously for a period of not less than twelve months. Based on this undisputed fact, the period of service of the respondent together with the appellant is more than twelve months.

[89] Since the respondent has been terminated by the appellant, the respondent can rely on reg 6(1) of the Employment Regulations (Termination and Temporary Employment Benefits) 1980 for the calculation and formula of payment of the respondent's wage rate and length of service with the appellant.

[90] There are also additional issues which has been argued by the appellant and this court finds that it is not in favour of the appellant and will not change the outcome of this appeal. On the issue of whether there was a dispute within the jurisdiction of the Director General to decide it, this court is satisfied that the principles in the case of *Uvarajah Kanasevan & Anor v Penolong Pengarah Buruh, Butterworth & Ors* [1992] 2 MLJ 152; [1992] 1 CLJ Rep 348 has been fully complied with as described as follows:

> in so far as inquiries under s 69 are concerned. This court in *Asia Motor (KL) Sdn Bhd v Ram Raj & Anor* [1985] 2 MLJ 203; [1985] 1 LNS 34 held at p 206 (MLJ) that a dispute under s 69(1) of the Employment Act must satisfy three conditions, viz:
>
> 1. That it is a dispute between an employee and his employer;
> 2. That it is a dispute to pay wages; and
> 3. The dispute arose out of any terms in the contract of service between such employee and his employer.

[91] Throughout the hearing of this appeal, both learned counsels have helped this court with thoughtful arguments and this, without a doubt, has facilitated this court in making a final decision.

CONCLUSION

[92] This court agrees, this appeal shows that there are serious appealable errors by Director-General of Labour Office that warrants the interference of this court and ought to be corrected by this court by way of allowing part of the claims of this appeal.

[93] In *Robert Lee @ Robert Seet & Anor v Wong Ah Yap & Anor* [2007] 4 MLJ 393, Abdul Hamid Mohamad FCJ (delivering judgment of the court) held that:

> *It is true that the courts, through its decisions try to arrive at a 'fair and just' results. But, it can only do so within the confines of the law, not through some general and vague sense of fairness and justice. The building may be called The Palace of Justice', but the courts it houses are the courts of law*. (Emphasis added.)

[94] This court decided that part of the claim allowed by the Director General of the Labour Office is hereby, set aside, and the appeal is allowed as per the following order:

(a) perintah Ketua Pengarah Jabatan Buruh bagi pembayaran jumlah sebanyak RM318.241.71 kepada Jamaludin bin Ismail dan sembilan yang lain diketepikan;
(the order of the Director of the Labour Office for the payment of RM318,241.71 to Jamaludin bin Ismail and nine others is set aside);

(b) perintah bagi pembayaran wang berjumlah RM49,803.82 dikekalkan;
(the order for the payment of money amounting to RM49,803.82 is affirmed);

(c) perintah bagi pembayaran wang berjumlah RM 19,509.66 juga dikekalkan; dan
(the order for the payment of money amounting to RM 19,509.66 is also affirmed); and

(d) tiada kos diperintahkan bagi rayuan ini, kos ditanggung pihak-pihak masing-masing.
(no costs are ordered for this appeal, costs are borne by the respective parties).

Appeal allowed in part.

Reported by K Selvaraju